

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA DIVISION**

TENTATIVE RULINGS

EVENT DATE: 08/03/2016
JUDICIAL OFFICER: Kevin DeNoce

EVENT TIME: 08:20:00 AM

DEPT.: 43

CASE NUM: 56-2014-00461953-CU-BC-VTA

CASE TITLE: US LEASE FINANCING INC VS. CHICAGO TITLE INSURANCE COMPANY

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Motion for Summary Judgment and/or Adjudication - of Issues of Defendants Chicago Title Insurance
CAUSAL DOCUMENT/DATE FILED: Motion for Summary Judgment and/or Adjudication, 12/28/2015

The morning calendar in courtroom 43 will begin at 9 a.m. Cases including *ex parte* matters will not be called prior to 9 a.m.

Please check in with the courtroom clerk by no later than 8:45 a.m. If appearing by CourtCall, please call in between 8:35 and 8:45 a.m.

With respect to the below scheduled tentative ruling, no notice of intent to appear is required. If you wish to submit on the tentative decision, you can send an email to the court at: Courtroom43@ventura.courts.ca.gov or send a telefax to Judge DeNoce's secretary, Christine Schaffels at 805-477-5894, stating that you submit on the tentative. Do not call in lieu of sending a telefax. If you submit on the tentative without appearing and the opposing party appears, the hearing will be conducted in your absence. This case has been assigned to Judge DeNoce for all purposes.

Absent waiver of notice and in the event an order is not signed at the hearing, the prevailing party shall prepare a proposed order and comply with CRC 3.1312 subdivisions (a), (b), (d) and (e). The signed order shall be served on all parties and a proof of service filed with the court. A "notice of ruling" in lieu of this procedure is not authorized.

For general information regarding Judge DeNoce's rules and procedures for law and motion matters, *ex parte* matters, telephonic appearances, trial rules and procedures, etc., please visit: <http://www.ventura.courts.ca.gov/Courtroom/C43>

The court's tentative ruling is as follows:

Chicago Title Insurance Company and Fidelity National Title Group, Inc.'s motion for summary judgment or, alternatively, summary adjudication of issues. (opposed)

Deny Chicago Title Insurance Company and Fidelity National Title Group, Inc.'s motion for summary judgment. Grant the alternative motion for summary adjudication of the 3rd, 4th and 5th causes of action. Deny the alternative motion for summary adjudication of the 1st, 2nd and 6th causes of action.

For purposes of this motion only:

- UMFs 1-29, 33, 36-47, 49-54, 56, 58, 59, 61, 63, 66-73 and 79 are undisputed.
- UMFs 60, 62, 64, 75, and 78 are disputed, but nonetheless established.
- UMFs 31, 32, 34, 35 are disputed. They contain both legal conclusions and facts related to the Trustees Sale Guaranteed. To the extent they simply restate word for word the provisions of the Trustees Sale Guaranteed they are established.
- UMFs 30, 48, 57 and 65 are disputed and constitute legal conclusions, not material facts.
- UMFs 55, 74, 76 and 77 are disputed and not established by the evidence defendants rely upon.

TENTATIVE RULINGS

Defendants have filed evidentiary objections to the declaration of Kirk Grossman. Pursuant to CCP §473c(q) the court declines to rule on the objections.

Discussion:First Cause of Action for Breach of Contract –

Chicago Title alleges that it did not breach any duty owed to P. Chicago Title asserts that it issued a trustee's sale guarantee to P. Under a trustee's sale guarantee, there is "no duty to defend or prosecute" claims. 3 Miller & Starr, Cal. Real Estate (3d ed. 2015) §7:198. Under such a guarantee, the issuer has "the option to pay or otherwise settle the claim" in which case "liability under the guarantee is terminated." *Id.* A trustee's sale guarantee "limits the exposure of the insurer to the amount of liability assumed by the insurer under the TSG." *Id.* Liability cannot "exceed the amount specified in the TSG." *Id.*

Chicago Title claims that it could not have breached any duty to defend or prosecute claims for P, because the TSG imposes no such duty. Chicago Title argues that it did not breach any duty to indemnify P because it paid P the full TSG liability limit long before there was a final determination regarding any title issue. See *Archdale v. American International Specialty Lines Ins. Co.*, (2007) 154 Cal.App.4th 449, 466 (where insurer provides indemnity to the extent of its policy limits there is no breach of contract claim). In addition, the TSG expressly limits liability to the amount specified in the TSG, which it paid.

In order to establish a breach of contract, the plaintiff must show: 1) a valid and enforceable contract; 2) plaintiff's performance or excuse for nonperformance; 3) defendant's breach; and 4) damage to plaintiff. *Reichert v. General Ins. Co. of America* (1968) 68 Cal.2d 822. The pleadings define the issues to be considered on a motion for summary judgment. *Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252. Defendant's argument is based upon P claiming they violated a duty to defend and indemnify. However, it isn't clear that a failure to defend and indemnify is the sole basis for P's breach of contract claim. P seems also to be claiming that defendants failed to timely pay under the policy. See Complaint ¶38. None of the proposed UMF's establish that defendants timely paid P's claim or that this cannot be the basis of P's breach of contract cause of action. Consequently, defendants have failed to meet their burden.

Second Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing – Chicago Title claims that the 2nd cause of action fails for the same reason the 1st cause of action fails. Chicago Title claims that a breach of the covenant of good faith and fair dealing requires a P to establish that policy benefits due were withheld. See *Waller v. Truck Ins. Exchange Inc.* (1995) 11 Cal.4th 1, 37; *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2013) 217 Cal.App.4th 62, 81. The court denies the motion for summary adjudication of the 2nd cause of action based upon the same reason for denying the motion for summary adjudication of the 1st cause of action. Defendants have not established that they timely paid P under the policy. Defendants proposed UMF's do not establish the basis of this cause of action.

Third Cause of Action for Violation of Insurance Code Section 790.03 –

Chicago Title argues the 3rd cause of action fails because there is no private cause of action under Insurance Code §790.03. See *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287; *Rattan v. Unites Servs. Auto Ass'n.* (2000) 84 Cal.App.4th 715, 724. P concedes that there is no cause of action for violation of Insurance Code §790.3. However, P claims that the same allegations could support a cause of action for violation of Insurance Code §332 and invited D to stipulate to letting the complaint be amended. No such stipulation has occurred and therefore the court grants the motion for summary adjudication of the 3rd cause of action.

Fourth Cause of Action for Violation of Unfair Claims Settlement Practices Regulations –

Chicago Title argues the 4th cause of action fails for the same reason the 3rd cause of action fails. P concedes that there is no cause of action for violation of unfair claims settlement practices regulations. As such, the court grants the motion for summary adjudication of the 4th cause of action.

Fifth Cause of Action for Breach of Fiduciary Duty –

Chicago Title argues that the 5th cause of action for breach of fiduciary duty fails because there was no fiduciary duty between it and P. Under CA law, the insurer-insured relationship is not a true fiduciary relationship. *Vu v. Prudential Property and Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1150-51. Because there is no true fiduciary relationship, an insurer's alleged breach of fiduciary like duties is adequately redressed by a claim for breach of the covenant of good faith

and fair dealing. *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1212. P fails to address Chicago Title's argument related to the 5th cause of action.

"[A]n insurer's breach of its 'fiduciary-like duties' is adequately redressed by a claim for breach of the covenant of good faith and fair dealing implied in the insurance contract." *Tran v. Farmers Group, Inc.* (2002) 104 Cal.App.4th 1202, 1212, as modified on denial of reh'g (Jan. 27, 2003). Based upon plaintiff's maintaining of its 2nd cause of action and its failure to address the legal authority presented by defendants, the court grants the motion for summary adjudication of the 5th cause of action.

Sixth Cause of Action for Fraud –

Chicago Title argues that the fraud cause of action fails because it did not make any misrepresentations to P before or after the TSG was issued. Chicago Title also asserts that it did not violate any duty owed to P under the contract and that the 6th cause of action is barred by the economic loss rule.

The pleadings define the issues to be considered on a motion for summary judgment. *Ferrari v Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252. The 6th cause of action is based upon defendants' alleged failure to convey material facts to the plaintiff. Comp. ¶81. It isn't clear from the complaint what those material facts were. The scope of plaintiff's claim is not adequately defined in the complaint or in any of the defendant's UMFs. While this lack of specificity might be an appropriate grounds for demurrer, defendants have not argued the pleadings are impermissibly vague. Instead, they have sought summary adjudication.

" [T]he elements of an action for fraud and deceit based on concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248 (internal citations omitted).

Defendants attempt to demonstrate that they didn't intentional defraud of conceal anything from Plaintiff based upon what attorney Grossman indicate he believed at a deposition. However, that is not sufficient to establish an absence of wrong doing by defendants. It isn't enough to establish that plaintiff has no evidence to establish these elements of the cause of action. In addition, defendant provides no legal support for its economic loss rule argument and establishes no facts showing it had no duty to disclose any information to P under the circumstances. Consequently, defendants have failed to meet their burden and the court denies the motion for summary adjudication of the 6th cause of action.

Fidelity Liability -

Fidelity argues that all of P's claims against it fail for the same reason P's claims against Chicago Title fail. In addition, all of P's claims against it fail because Fidelity is not a party to the trustee's sale guarantee. Again, the pleadings define the issues to be considered on a motion for summary judgment. *Ferrari v Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 252. Plaintiff alleges that Fidelity is the owner and/or the successor in interest to Chicago Title. Comp. ¶3. It apparently is seeking to hold Fidelity liable as such. Defendants have not explained how Fidelity's failure to be a named party to the trustee's sale guarantee somehow prevents it from being liable as an owner and/or successor in interest to Chicago Title. Consequently, the court denies Fidelity's motion for summary judgment as well.